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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1216

HARLAN DUHON and DONALD RAY LOVETT,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

On Application for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

The petitioners, Harlan Duhon and Donald Ray Lovett, through their undersigned counsel, respectfully petition this Honorable Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered on January 3, 1978, in case number 76-3998 on the Docket of the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, is annexed hereto and marked Appendix A. The said opinion commences on page 1300 of the Slip Opinions of the current term of the United States Court of Appeals for the Fifth Circuit.

There are no written decisions of the United States District Court for the Western District of Louisiana which relate to the issues presented by this petition.

GROUNDS ON WHICH SUPERVISORY JURISDICTION OF THIS COURT IS INVOKED

The judgment herein sought to be reviewed was made and entered on January 3, 1978. A copy of the said judgment is annexed as Appendix B to this petition.

A timely petition for rehearing was denied on January 30, 1978. A copy of that Order is annexed as Appendix C.

The United States Court of Appeals for the Fifth Circuit stayed the issuance of the mandate in these proceedings pending the timely filing of this petition for a writ of certiorari on or before March 1, 1978, pursuant to Fifth Circuit Local Rule 15 and Rule 41(b), F.R.A.P. The said stay is to remain in effect until this Honorable Court disposes of this case, pursuant to the

provisions of Rule 41(b), F.R.A.P. A copy of that Order is annexed as Appendix D.

28 U.S.C. §1254(1) confers jurisdiction upon this Honorable Court to review the judgment below upon a writ of certiorari.

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether prejudicial error occurred when the Trial Court, over the timely objection of the petitioners, admitted evidence of a prior labor dispute between the alleged victim and different labor leaders which occurred more than ten years prior to the episode alleged in the indictment in this case, when there had been no demand for money in the prior labor dispute, in contradistinction to the allegations made herein, and the prior labor incident involved property damage to some extent and there was no threat or attempt to do more than peacefully picket the alleged victim in this instance?

2. Whether the defendants were denied an effective right of confrontation and cross-examination of the Government's principal witness, Mr. Buckholtz, when the Trial Court refused to allow the defense to question Mr. Buckholtz on the basis of his statements made to FBI Agent and disclosed to the defense as Jencks Act statements, on the ground that such statements were not signed or otherwise adopted by the said witness and constituted hearsay.

3. Whether the Trial Court improperly denied petitioners an effective exercise of their right of confrontation and cross-examination when, after the said witness had been shown to have made several statements before the grand jury which contradicted his testimony before the petit jury on the trial of this case, the prosecution asked the witness for the first time about a hearing problem he had at the time of his testimony before the grand jury and the Trial Court refused to permit recross-examination of the witness on this new matter which was designed to rehabilitate the Government's principal witness.

4. Whether prejudicial error occurred in the closing argument of the prosecutor, on rebuttal, when the prosecutor argued "You know, we wonder why no one will come forward as a witness. There is the reason. You think he won't pay a price [referring to the alleged victim]? Wait until his next construction in DeRidder. You think he hasn't paid a price? He is a witness, a man who got money taken from him and he is called a thief. * * *," which argument was designed to appeal to the jurors' civic duty to protect future witnesses against attacks on their character by defendants.

5. Whether the Trial Court's ruling, that the Government would be permitted to cross-examine defense character witnesses regarding petitioners Duhon's arrest and indictment on an independent charge arising subsequent to the events alleged in the present case, was erroneous and improperly deterred petitioners from presenting character evidence.

CONSTITUTIONAL, STATUTORY AND FEDERAL RULES PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a * * * trial * * * by an impartial jury * * *; to be confronted with the witnesses against him * * *.

The Federal Rules of Evidence, Rules 401 through 406, provide in relevant part:

Rule 401. Definition of "Relevant Evidence

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Pub.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1931.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible. Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1931.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Pub.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1932.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; other Crimes.

(a) *Character evidence generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

* * * * *

(b) *Other crimes, wrongs, acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity,

or absence of mistake or accident. Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1932.

Rule 405. Methods of Proving Character.

(a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. Pub.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1932.

Rule 406. Habit, Routine Practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1932.

Rule 611 of the Federal Rules of Evidence provides:

(a) *Control of the court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and present-

ing evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

* * * * * Pub.L. 930595, §1, Jan. 2, 1975, 88 Stat. 1936.

Rule 613 of the Federal Rules of Evidence provides:

(a) *Examining witness concerning prior statements.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a

party-opponent as defined in rule 801(d)(2). Pub.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1936.

Rule 801(d)(1) of the Federal Rules of Evidence provides:

(d) *Statements which are not hearsay.* A statement is not hearsay if —

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive * * *.

* * * * * Pub.L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1938.

STATEMENT OF THE CASE

This is a prosecution brought in the United States District Court for the Western District of Louisiana upon charges that petitioners violated 18 U.S.C. §1951, The Hobbs Act, by allegedly extorting a contractor of $5,000.00 in order to settle a fictitious labor dispute. The said District Court had exclusive original jurisdiction of the subject matter and the petitioners pursuant to 18 U.S.C. §3231.

Mr. Eugene H. Buckholtz is a contractor doing business in and about DeRidder, Louisiana, under the firm name of Southwest Construction and Paving, Inc. Southwest Constitution entered into a contract with West Brothers, a chain of department stores, to erect a prefabricated steel building which was to be used by West Brothers as a warehouse for stock to be sold in its stores. The said warehouse was to be erected on property belonging to the City of DeRidder, Louisiana, which had been designated by the town as an industrial park. Construction began on the warehouse project on June 24, 1974.

Southwest Construction and Paving, Inc., is a non-union company. Most of its business is done with the paper mill near DeRidder, Louisiana, which will not contract with union companies in order to avoid strikes, *etc.*, at that location.

On July 11, 1974, pickets were placed on the job site by the Southwest Louisiana Building and Construction Trades Council, of which petitioner Lovett was the Secretary-Treasurer and ex-officio Business Manager. The local Assistant Business Manager of the laborers' union did not know why the picket line was established when he was asked by Mr. Buckholtz. Following an inquiry to petitioner Lovett, the local laborers' union representative set up a meeting between Mr. Buckholtz, Mr. Brandt (the representative for West Brothers), and several Business Agents for the various trades represented by the Southwest Louisiana Building and Construction Trades Council. Mr. Brandt invited a Mr. Stewart, an Assistant City Attorney for the City of DeRidder, to attend because he

felt the city had some interest in the problem because it owned the property upon which the West Brothers warehouse was to be erected.

With the said attorney present, the labor leaders were reluctant to discuss their demands and just generally declared that the contractor had to "get right" with the union. When pressed to state what was necessary to end the picketing, petitioner Lovett declared, "Mr. Buckholtz knows what it will take." Mr. Stewart then suggested that petitioner Lovett and Mr. Buckholtz "take a walk and see if you all can't get this thing resolved." Petitioner Lovett and Mr. Buckholtz left the room and returned a short while later and announced that the dispute was settled. The pickets were removed that afternoon and were not put up again. The erection of the warehouse was completed without further incident.

Mr. Buckholtz and Mr. Brandt left the meeting together. Following the meeting, Mr. Brandt gave Mr. Buckholtz a check in the amount of $5,000.00, ostensibly to reimburse Mr. Buckholtz for the expenditures made in connection with the settlement of the labor dispute. The discussion of a payoff originated between Mr. Buckholtz and Mr. Brand, not between them and anyone from the labor movement. Mr. Brandt asked Mr. Buckholtz if $10,000.00 would be sufficient to solve the problem. Mr. Buckholtz suggested that it could possibly be done for $5,000.00. These conversations occurred before the meeting at which the labor problem was resolved. Mr. Buckholtz testified at the trial that he asked petitioner Lovett, at their private session during the July 16th meeting, if $5,000.00 would get the

pickets removed. Neither Lovett nor anyone else had suggested a payoff. All of the union men who were present at the meeting said Buckholtz would have to "get right" with the union. That meant to sign a union contract and employee union tradesmen on the job. Significantly, Government Exhibit G-5 was a contract with the Southwest Louisiana Building and Construction Trades Council in which Mr. Buckholtz agreed to hire union employees in connection with the erection of the West Brothers' warehouse. Of further significance, on the day following the meeting, Mr. Buckholtz cashed the $5,000.00 check which Mr. Brandt had given to him on the afternoon before, and then obtained fifty $100 bills. Several days after cashing that check, Mr. Buckholtz bought a camp, paying $3,500.00 in cash and some $19,000.00 or so in checks for it. His wife, who attended the Act of Sale, stated that the cash involved mostly $100 bills. The source of this case money, according to the testimony of Mr. Buckholtz, was from the excess of checks written at the grocery store and from rental checks. It is extremely doubtful that he wrote checks at the grocery store in excess of $100 in order to have had $100.00 in change. And even if he did, it is doubtful that the grocery store gave him $100 bills in change, from which he compiled this cash of $100 bills used to supplement the two checks given in payment for the fishing camp.

There was testimony about various telephone calls which were made between Lovett and Buckholtz and between Buckholtz and Brandt. The telephone bills for Southwest Construction (G-6), West Brothers (G-13), Southwest Louisiana Building and Construction Trades Council (G-15), and the IBEW Local (G-16) were

admitted in evidence. The order in which the calls were made cannot be established by the billings. The testimony from Mr. Buckholtz was to the effect that Lovett called him and asked him to meet in Lake Charles for the payoff; Buckholtz called Brandt to inform him that the petitioners had called and requested delivery of the payoff, but spoke to Mrs. Brandt who told Mr. Buckholtz that Mr. Brandt was indisposed and would return his call later that day. There is no mention by Mr. Buckholtz of any conversation with petitioner Duhon of the Electrical Workers Union. The defense testimony was to the effect that Mr. Buckholtz called Lovett, who was not there, and asked that Lovett return the call. When Lovett returned the call, Mr. Buckholtz asked him to get in touch with petitioner Duhon and have him call Mr. Buckholtz. The telephone bills do show that Mr. Buckholtz made a direct-dialed telephone call to the Trades Council office (reflected by an AD billing code on Government Exhibit G-6) after speaking with Mr. Brandt's wife in Colorado. Lovett made a credit card call to Buckholtz that day (reflected by a 3L billing code on G-15). And Duhon made a credit card call to Buckholtz that same day (reflected by a 3K billing code on G-16). There would have been no reason for both Lovett and Duhon to call Buckholtz to arrange for the alleged payoff. The telephone records therefore support the defense's version that Buckholtz called Lovett to have him get in touch with Duhon to have Duhon call Buckholtz — a carefully contrived scheme to support Buckholtz' story if he should ever be accused of keeping the payoff money. It does not support Buckholtz' testimony that he returned Lovett's call, because Lovett obviously spoke to Buckholtz when he called

him because Lovett's call was made person-to-person (reflected by the 3L billing code on G-15), which would have been billed only if he reached Mr. Buckholtz personally.

We respectfully submit that a strong case was thus made out that Buckholtz kept the money Brandt gave him to make a payoff to petitioners and used that money partly for the purpose of buying a fishing camp. The testimony of Mr. Buckholtz supplied the only direct evidence of a payoff. One extremely significant factor, gleaned from the objective evidentiary sources, is found in the testimony of the assistant city attorney, Mr. Herman Steward, is that Mr. Buckholtz looked as if he had been raked over the coals when he returned to the meeting with the union representatives. According to both Buckholtz and Brandt, it was expected that they would have to make some sort of payoff, and $5,000.00 was the least amount discussed by them. It is therefore logical to assume that Buckholtz' expression and demeanor were not occasioned by his having to make a payoff, especially since West Brothers had agreed to provide the money for this purpose. Obviously, Mr. Buckholtz' expression and demeanor were occasioned by his having done something he dreaded doing, namely signing the union contract. (G-5).

During the cross-examination of Mr. Buckholtz, the defense presented to him a statement which had been attributed to him and which was inconsistent with his testimony at the trial of this matter. Defense counsel asked the witness if he made the statement to the FBI. The witness testified, "I am sure I did, yes, sir." The

prosecution objected to the use of this prior contradictory statement to impeach the testimony of the Government's principal witness on the grounds that the witness had never read, subscribed, adopted or otherwise ratified the said statement. The defense offered to question the witness in the following manner: "what we should point out to the jury is that Mr. Drewett has the document, you know, Mr. Witness, I am not saying this is a statement that you wrote, prepared or signed. We are trying to determine — let the jury know that this is not — it differs from Grand Jury testimony and a signed statement. We are trying to determine if that is what he told the agent." (Tr. 206) The Trial Court refused to allow the defense to use this vital impeachment material to attack the only witness who directly testified to the essential elements of the offense charged. There was much more material in that statement which was useful for impeachment purposes than there was in the said witness' grand jury testimony. The defense was relegated to using the transcribed verbatim testimony of the witness before the grand jury in order to impeach him. Numerous instances of inconsistent testimony were brought out on cross-examination using this less substantial impeachment document. On rebuttal, the prosecutor attempted to rehabilitate its key witness by asking him, "Mr. Buckholtz, do you sometimes have difficulty hearing the questions?" After an affirmative response, the prosecution then emphasized the severity of Mr. Buckholtz' hearing problem by obtaining an affirmative response to the question: "You are about to go in surgery for an ear operation?" (Tr. 231) The Trial Court refused to allow defense counsel to interrogate the witness at all on this alleged hearing

problem, which was brought up for the first time on redirect examination.

In the closing argument to the jury, the prosecutor made the rebuttal argument quoted in the formulation of the fourth paragraph of The Questions Presented for Review, *ante*. The appeal of this argument was designed to make the jury believe it would do damage to the entire future of criminal prosecution if it should acquit the petitioners. The defense moved for a mistrial, which motion was denied by the Trial Court.

Two other rulings of the Trial Court form the basis for the remaining issues of this petition. In one of them, the Trial Court admitted testimony concerning a problem Mr. Buckholtz had had with different labor leaders ten years prior to the alleged offense. The Government was sustained in its effort to present this evidence on the ground that it was relevant to the state of mind of the alleged victim. The previous episode involved property damage, while none was either done or threatened in this case. There had been no work stoppage in the previous incident. And Mr. Buckholtz completed the construction project with the pickets still in place. The defense argued that such evidence, if relevant at all, was prejudicial beyond its probative value. The Court admitted it over defense counsel's objection.

The other incident which gives rise to an issue in this petition occurred when defense counsel sought a ruling *in limine* from the Trial Court with regard to whether subsequent-arrest-interrogation would be permitted if defendant Duhon presented character wit-

nesses. The subsequent event for which petitioner Duhon had been arrested was a charge of conspiracy to commit aggravated criminal damage to property and a conspiracy to commit murder, arising out of a strike and ensuing labor violence at a construction site of a chemical plant being constructed for Jupiter Chemical Company in Southwest Louisiana. Significantly, it was the statewide adverse publicity arising out of the Jupiter incident which occasioned the provisional change of venue to Monroe, Louisiana — the farthest point in Louisiana from the place of the labor violence at which Federal Court is held — with the stipulation that if the prejudicial publicity was found to have saturated that area of Louisiana then venue would be changed to another state. Following the Jupiter incident, the supporters of a "Right-to-Work" bill before the Louisiana Legislature sponsored a statewide campaign depicting on television the destruction and violence at the Jupiter Chemical plant site. Also tied to organized labor were unsubstantiated, and later refuted, claims that organized labor had caused the murder of a prominent advertising executive who conducted the "Right to Work" campaign. Even though the jurors, on voir dire examination, had denied either hearing about the Jupiter incident, the murder, or the "Right to Work" campaign, or that they would be influenced thereby, there was too great a danger to the defense if the prosecution were allowed to bring this incident out before the jury. The Trial Court rules that the prosecution would be allowed to interrogate petitioner's character witnesses about their knowledge of his arrest in connection with the Jupiter incident, thus forcing petitioner Duhon to forego the benefit of adducing character evidence in his own defense. The denial of the benefit

of this type evidence, occasioned by the Trial Court's erroneous ruling *in limine*, effectively denied petitioner Duhon an opportunity to defend himself with relevant evidence which, in a case as close as this one, might have been adequate to supply a reasonable doubt about his guilt in this case.

REASONS FOR GRANTING THE WRIT

1. The ruling of the Trial Court, affirmed by the Court of Appeals, which admitted evidence of an incident which occurred ten years previously to the act in question in this case and which involved vandalous but non-extortionate behavior of different labor officials and men than were involved in this case, on the theory that such evidence was relevant to the alleged victim's state of mind, presents an important question of federal law which has not been, but should be, decided by this Honorable Court.

Petitioners do not dispute the right of the Government to present evidence of prior similar occurrences in order to demonstrate the reasonableness of a victim's state of mind in a Hobbs Act (18 U.S.C. §1951) case. Such evidence has been allowed by each Circuit which has considered the question, *e.g.: United States v. Glasser*, 443 F.2d 994 (2 Cir.), *cert. den.*, 404 U.S. 854 (1971); *United States v. Stirone*, 311 F.2d 277 (3 Cir. 1962), *cert. den.*, 372 U.S. 935 (1963); *United States v. Hyde*, 448 F.2d 815, 845-846 (5 Cir. 1971); *United States v. Battaglia*, 394 F.2d 304, 313 (7 Cir. 1968), *remanded on oth. grnds.*, 394 U.S. 310 (1969), *appeal after remand*, 432 F.2d 1115, 1119 (7 Cir. 1970); *Callanan v. United States*, 223 F.2d 171, 174-176 (8 Cir.), *cert. den.*, 350 U.S. 862 (1955). But such cases as these do not deal with the

issue herein presented, *i.e.*, the relevance of such evidence to demonstrate the victim's state of mind when such evidence is remote to the relevant time frame, involved different people, and is dissimilar to the events in question which allegedly produced the victim's alleged state of mind.

The Government recognized the thrust of petitioners' argument to be the lack of similarity and the remoteness of the alleged prior labor experience. The Government argued that similarity is not required (Appellee's Brief, p. 22), and (ibid.):

> * * * There are no cases that place a limit on a victim's past experiences contributing to his fearful state of mind or requiring exactness [or] similarity as there is no logical reason to do so. * * *

While the cases do not appear to require that the conduct be similar, the evidence approved in the numerous cases under this rule of evidence has been similar to the conduct at issue or at least part of a continuing transaction involving the same people. The *Glasser* case involved a past incident of spraying acid on plate glass windows which had been installed by non-union glaziers, including one such incident in which there was direct proof of the defendant's involvement, in a Hobbs Act prosecution for extortion to require people who wanted such glass replaced to use glaziers who hired union labor. The *Battaglia* case involved actual threats of violence relative to a previous contract by co-defendants involved in the alleged extortion of a similar nature to that charged in the said

case to show the alleged victim's fear in the present case was reasonable. The *Hyde* case involved an industry-wide knowledge that payoffs had to be made to State officials in order to obtain a stock issue in the State of Alabama. Each of these cases involved recent or on-going patterns or practices, involving the same persons. The above three cases are representative of the entire jurisprudence, until the decision in this case.

The present case is the only reported decision which could be found by this writer, and apparently by the Government as well, which justifies the admission of remote, dissimilar conduct by different persons to prove the reasonableness of an alleged state of fear in the alleged victim. The decision is not only unwarranted but it is unreasonable.

The petitioners cited *United States v. Broadway*, 477 F.2d 991 (5 Cir. 1973), to the Court below for the proposition that dissimilar conduct by different persons long ago is irrelevant to a determination of the state of mind of the alleged victim. The Court below responded (Slip Opinion, p. 1309):

> * * * Evidence of conduct of persons other than a defendant that is relevant to an alleged extortion victim's fearful state of mind is admissible regardless of its degree of similarity to the situation that gave rise to the alleged extortion.

We respectfully disagree, especially when the dissimilar conduct was performed by not only different

persons but was done so long ago that there is no conceivable nexus between it and the alleged victim's present state of mind.

Therefore, petitioner respectfully urges this Honorable Court to exercise its discretion in favor of reviewing this case on certiorari and enunciating the limitations, if any, which must be placed upon this highly prejudicial brand of evidence.

2. The rulings of the Trial Court, affirmed by the Court of Appeals, which foreclosed cross-examination of the Government's key witness (who the defendants were attempting to show was the real recipient of the money derived from the alleged extortionable activity) with regard to prior inconsistent statements made by him to F.B.I. Agents on the ground the said witness had not signed or otherwise adopted these statements, and which foreclosed cross-examination of that same witness with regard to a hearing problem, which was brought out for the first time on redirect examination in order to attempt to rehabilitate the witness with respect to prior inconsistent statements made before the grand jury, squarely conflicts with numerous decisions of this Honorable Court, commencing with Alford v. United States, 282 U.S. 687 (1931) and continuing to the present date.

While the Court may have discretion to limit cross-examination, that discretion does not exist until the right of cross-examination has been fully accorded. There was no right of cross-examination accorded at all with respect to the Government's key witness hearing problem. That came out on redirect to show why the witness' prior statements had been contradictory,

i.e., because he could not hear the questions. But no opportunity was even accorded the petitioners to ask the witness if he could hear the questions. Only the inference was created by the witness' answer on redirect. The Government has argued in the District Court and in the Court of Appeals that petitioners were enabled to bring out the prior contradictory statements before the grand jury, and that the impeachment from the F.B.I. 302's would have been cumulative and non-contributory to the assessment of the witness' credibility. Especially in view of the Court's ruling with regard to cross-examination of the witness regarding his hearing problem in the grand jury, the alternate source of impeachment to the F.B.I. 302's, the petitioners were prejudiced by the Court's ruling disallowing cross-examination of the witness on the basis of his statements to F.B.I. Agents.

The Trial Court apparently confused the requirements of 18 U.S.C. §3500 with the rights of the accused to cross-examine a witness on the basis of a prior contradictory statement. The 302-statements were made under the sanction of 18 U.S.C. §1001. That would appear to bring that statement within the terms of Rule 801(d)(1)(A), Federal Rules of Evidence, which would permit admission of the statement itself. Of course, the proper foundation would have been necessary in order to have the F.B.I. 302's admitted. But it was the cross-examination which was predicate to proving the statement was made which was curtailed. The witness must have been asked if he made the statement and told when and to whom. If he denied it, the existence of the statement could be proved by the testimony of the FBI Agent who took it and his Report

of Interview (Form 302). If the witness admitted the prior inconsistent statement was made, then the impeachment value of the prior inconsistency would have been attained. But by denying even the opportunity to ask if the statement was made, the defendant's right of confrontation of the Government's key witness was denied and defendants were prejudiced thereby.

For having denied substantial cross-examination of the Government's key witness, this Court should grant its writ of certiorari and review and reverse the judgment below.

3. The Trial Court's ruling, affirmed by the Court of Appeals, relative to the prosecutor's rebuttal argument was highly prejudicial to the petitioners and sanctioned a gross departure from the norms of fair trial, as that term is used in a constitutional context, which calls for the exercise of this Court's supervisory jurisdiction.

In the Statement of the Case, ante, we have attempted to show that the conclusion that Mr. Gene Buckholtz used the picketing by petitioners' unions as an opportunity to mulct the owners of the warehouse he had contracted to construct of the $5,000.00 which he said he gave to petitioners. The circumstantial showing of this was substantial, if not conclusive. Several days after West Brothers gave Buckholtz a check for $5,000.00, which Buckholtz converted to fifty $100.00 bills, Buckholtz spent $3,500.00 in cash, mostly in $100.00 bills according to Buckholtz' own wife. The story that these $100 bills were attained from the

change for checks written in excess of the amount of purchases at the grocery store and from cashing checks for rental receipts is incredible, if not outright preposterous. And the fact that Buckholtz waited until Brandt, the West Brothers representative, was in Colorado to "deliver" the money, more than a month after the alleged extortion, clearly shows that Buckholtz wanted to avoid the risk of having Brandt say he wanted to accompany Buckholtz to the scene of the payoff. Extortioners do not wait for a month before demanding payment. The money was proved to have been given to Buckholtz. It was not given to petitioners. The buck stopped with Buckholtz.

In closing, the prosecutor argued:

> You know, we wonder why no one will come forward as a witness. There is the reason [referring to the accusation against Buckholtz]. * * * He is a witness, a man who got money taken from him and he is called a thief. Oh, no, Ladies and Gentlemen, you can't have it both ways. Either Gene Buckholtz is an honest man who came forward and told the truth and fulfilled his duty as a citizen and was a witness and these men are guilty as charged, or he is the thief and the crook and the con man they paint him to be. * * *

Petitioners urge that the prosecutor's argument had the effect of stating to the jury that an acquittal would undermine law enforcement efforts in the future because it would discourage victims of extortion from coming forward as witnesses. This was an appeal to

the jurors' sense of civic responsibility not in this case but with regard to all future cases. It was an appeal to the sympathy of the jurors not for Buckholtz but all future witnesses. This argument went far beyond the present case. Such a departure from the tenets of fair trial in this nation should not be sanctional. This Court should therefore exercise its supervisory jurisdiction in this regard as well.

4. The opinion of the Court below squarely conflicts with an applicable and appropriate decision of the United States Court of Appeals for the District of Columbia Circuit, made in *United States v. Lewis*, 157 U.S.App.D.C. 43, 482 F.2d 632 (1973).

On the trial of this cause, petitioner sought an *in limine* ruling from the Trial Court with regard to whether the Government would be allowed to cross-examine character witnesses about arrests made after the date of the offense in this case. The Court ruled that the Government would be so permitted. Petitioner, rather than risk the prejudice which would accrue from the admission of such evidence, forewent his right to present evidence of his good character.

In *United States v. Lewis, supra*, at 482 F.2d 641-642, the Court discussed the rule and the reasons for not allowing evidence of community reputation subsequent to publication of the charge on trial. Various excerpts from the Lewis opinion are set forth as follows:

> There is, however, one feature of the instant case which has no counterpart in *Michelson* [v. United States, 335 U.S. 469 (1948)].

Appellant's narcotic arrest took place two weeks before the commencement of his second trial, but ten months after occurrence of the offense for which he was being tried. The point in time at which any character trait for peace and good order was relevant to the issues was the date of the offenses on trial, and appellant's effort to establish it favorably would have been limited to a showing of his community reputation therefor at that time. Since proof of a reputation at a given time may tend to indicate what the reputation at a later time is, his character witnesses might have been allowed to testify as to a reputation existent during a period prior to and not remote from the offense date. On the other hand, since the community's view of the accused's character could well be affected by the gossip which frequently follows on the heels of a criminal charge, his reputation in the community after the charge became publicized might not be a trustworthy index to his actual character. For this reason, the courts have generally held that a reputation subsequent to publication of the charge on trial is not admissible in evidence. (Footnotes omitted.)

The Court below said in the case *sub judice* (Slip Opinion, p. 1310):

> * * * The Lewis Court recognized that cross-examination on such subjects was basically within the trial court's discretion. *See, id.*, 157 U.S.App.D.C. 53, 482 F.2d at 642. This court has

> recently indicated its approval of the general rule espoused by *Lewis*. * * * (Footnotes omitted.)

The Court below did not allude to any exercise of discretion by the Trial Court, so as to distinguish the ruling of the Trial Court in this case from an arbitrary, capricious or whimsical — or mistaken — assertion of power. The *Lewis* Court discussed the manner in which judicial discretion might be fairly and properly exercised (482 F.2d at 642):

> * * * Some discretion in the matter is more in keeping with the broad discretion which judges have as to the admission of character testimony, and which traditionally they have exercised over the scope of cross-examination, than is any inexorable rule on the subject. A measure of discretion imparts to the proceedings a desirable degree of flexibility to shape the judge's ruling to the "numerous and subtle considerations" [67. *Michelson v. United States, supra*, note 13, 335 U.S. at 480] appearing. Not every situation calls for exclusion of questions exploring knowledge of events occurring after the time in issue. Not every subsequent event is an unacceptable topic, nor a topic so prejudicial as to outweigh its probative significance; some events otherwise objectionable perhaps could be made unobjectionable. A decision to permit inquiry respecting subsequent events should, of course, be reached cautiously, and only for the best of reasons. But in the final analysis

> the matter should be left to careful handling by the trial judge, subject to appellate correction only where mishandling is clear. (Footnotes omitted, except where incorporated within brackets in the above quoted text.)

The decision in this case was not made "only for the best of reasons." The Trial Court saw no difference between prior and subsequent arrests for purposes of character-witness cross-examination. There was no exercise of discretion at all. Had there been, it is sure that the evidence would have been excluded just on the ground of prejudice beyond probative value. The subsequent event at issue was massive labor violence in the Lake Charles, Louisiana, area which was publicized statewide during a right-to-work campaign seeking citizen support for a pending legislative bill. Both petitioners here had been arrested as conspirators, simply because of their official positions in the labor movement. The change of venue granted in this case was required by that publicity. Had petitioners been identified with this labor violence, it is certain they would have been prejudiced before the jury.

The *Lewis* case contemplates a true exercise of discretion, with the exclusion of subsequent event cross-examination as the usual procedure. The decision refers to "Some discretion"; "A measure of discretion"; "shap[ing] the judge's ruling to the 'numerous and subtle considerations"; and the Court pointed out that "Not every situation calls for exclusion * * *"; "Not every subsequent event is an unacceptable topic"; *etc.* And the Court made reference to tailoring the evidence actually admitted to serve the least harm to the defense. The Court below treated the issue as one calling for the exercise of ordinary discretion to *exclude*, whereas the *Lewis* Court regarded the allowance of subsequent event cross-examination to be one calling for the extraordinary use of discretion to *admit*, this class of evidence.

We respectfully submit that the *Lewis* case establishes the proper criteria for admitting or excluding subsequent event cross-examination of character witnesses. In view of the high incidence of arrests for crimes subsequent to the offense for which defendants are on trial, it should be recognized by this Court that this issue presents a recurring matter of grave importance to the administration of justice in the Federal Courts which calls for the exercise of this Court's discretion and supervisory jurisdiction.

The Court below held the error, if any, to be harmless. We respectfully submit that it was not. This was a close trial; otherwise the guilt of Gene Buckholtz could not have been established so clearly by the evidence in this case. Had Buckholtz been the one on trial, we do not believe there is a Court in the land which would have held the evidence against him to be insufficient on any essential element. Since character evidence may be adequate in such a close case to cause the jury to have a reasonable doubt, we respectfully submit that the Fifth Circuit's alternative holding that the Trial Court's ruling was harmless is inaccurate and warrants reversal of the judgment below.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant a writ of certiorari directing the Clerk of the United States Court of Appeals for the Fifth Circuit to certify and transmit the record in the proceedings below to this Honorable Court and to abide the further orders of this Court in the premises. Upon reviewing this case, this Honorable Court should reverse the judgment below and remand this case to the District Court for a fair trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James A. McPherson, attorney for Harlan Duhon and Donald Ray Lovett, petitioners herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of February, 1978, I served copies of the foregoing Petition for a Writ of Certiorari on the parties thereto, as follows:

1. On the United States of America, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, certified, return receipt requested, to the Solicitor General of the United States, Department of Justice, Washington, D.C., and also by mailing a copy in a duly addressed envelope, with air mail postage prepaid, certified, return receipt requested, to Mr. D. H. Perkins, First Assistant United States Attorney, U.S. Attorney's Office, Shreveport, Louisiana.

All parties required to be served have been served.

JAMES A. McPHERSON
Attorney at Law

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

versus

Harlan DUHON and
Donald Ray Lovett,
Defendants-Appellants.

No. 76-3998.

United States Court of Appeals,
Fifth Circuit.

Jan. 3, 1978.

Appeal from the United States District Court for the Western District of Louisiana.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

Defendants Harlan Duhon and Donald Lovett appeal from convictions for extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. The charge of extortion arose out of a $5,000 payment allegedly made to the defendants, two labor union officials, by a building contractor who was experiencing labor troubles at his construction site.

On appeal defendants present a number of assignments of error. Both Duhon and Lovett urge that: 1) the evidence presented at trial is insufficient to support a conviction for extortion; 2) the admission of evidence regarding previous labor troubles of the building contractor was prejudicial error; 3) the court's refusal to admit the testimony of a defense witness was erroneous as the witness's testimony would have rebutted the Government's impeachment of a defense witness. Defendant Duhon asserts that: 4) the cross-examination of a defense character witness as to a criminal charge against Duhon subsequent to the offense charged in the present case was improper and prejudicial. Defendant Lovett avers that: 5) the trial court erroneously prohibited the use in cross-examination of the FBI summaries of statements of two prosecution witnesses; 6) the denial of recross-examination of prosecution witness Buckholtz about his hearing problem was error; 7) the trial court's charge to the jury regarding the legality of the picketing at the construction site was irrelevant and prejudicial; 8) the prosecutor's jury argument constituted grounds for mistrial, and 9) the indictment charged an extortion of Buckholtz but the evidence could at most be construed as an extortion of West Brothers, the future owners of the warehouse. Finding all nine contentions without merit, we affirm.

Facts

As the circumstances of the alleged $5,000 payment to Duhon and Lovett are of crucial importance in this case, a detailed description of the facts is required. The prosecution's main witness was Eugene Buckholtz,

president of Southwest Construction and Paving, Inc. In 1974 his company began construction of a warehouse for West Brothers stores in DeRidder, Louisiana. The project involved some nonunion workers, including a nonunion electrical contractor. Soon after work began on the construction site, pickets from the Southwest Louisiana Building and Construction Trades Council appeared and some of the workers on the site walked off.

Buckholtz stated at trial that at this point he did not know why the pickets had been placed on the job site, and that Jim Barr, president of the local union, did not tell him the reason for the picketing. Buckholtz testified that he was especially worried about the picketing because of the large amount of construction materials scheduled to arrive at the site. In addition to this concern, Buckholtz testified as to a previous experience with labor trouble on a construction site in 1964, when he suffered the destruction of valuable equipment. Edward Brandt of West Brothers stated that delay in construction was particularly worrisome to him because carloads of merchandise were scheduled to be delivered to the warehouse around the anticipated completion date. Brandt and Buckholtz discussed what to do to stop the picketing. Brandt asked Buckholtz if he thought $10,000 would suffice, and Buckholtz replied that $5,000 should be enough.

Barr, the union local leader, set up a meeting to discuss the picketing. On July 16, 1974, a meeting was held between the local labor leaders, Lovett, Duhon, Barr, and Carlock, and the representatives of management, Buckholtz and Brandt. Herman Stewart, the city

attorney, was also present. After the meeting proceeded for several minutes it became apparent that group discussion would be fruitless. Buckholtz's inquiries into why the pickets were on his site were answered by Lovett with the statement that the site was "not right." Brandt testified that when he sought a more responsive answer, Lovett replied to the effect that the picketing might expand to include West Brothers' retail stores. Stewart testified that although he might have received the impression that the stores could possibly be picketed, he could not say that a direct statement was made. Stewart remarked that the meeting was going nowhere. Lovett responded that Buckholtz knows what it will take. Stewart then suggested that Buckholtz and Lovett take a walk.

Buckholtz testified that Lovett's tone changed dramatically once they left the meeting. According to Buckholtz, Lovett told him that the "whole thing could be resolved real easy," and put his arm around Buckholtz, who then asked him if $5,000 would take care of it. Lovett responded that everything should be all right and that he wanted Buckholtz to sign a labor contract with him. Buckholtz stated that he told Lovett he did not want to sign the contract because of his non-union maintenance workers at the paper mill. Lovett said that the contract only concerned the workers at the warehouse construction site. Some further discussion of employee positions at the construction site followed, and then Lovett and Buckholtz returned to the meeting. They told the other representatives at the meeting that their differences had been settled and the pickets would be withdrawn. The pickets were removed in the afternoon and never re-appeared. Neither the $5,000 payoff nor the labor contract was mentioned at

the meeting, and Buckholtz did not inform Brandt that he had signed a labor agreement with Lovett.

After the meeting Buckholtz told Brandt that he had agreed to pay $5,000. Later that afternoon Buckholtz received a check from West Brothers made out to his company. Buckholtz cashed the check the next day, receiving payment in fifty $100 bills. Buckholtz purchased a hunting camp soon after cashing the West Brothers check, paying for it with $3,500 in cash and two checks. Buckholtz testified that the $3,500 in cash had been accumulated over a few months by writing checks in excess of the amount owed at the grocery store and cashing rental checks from a bowling alley he owned. Buckholtz' wife testified that the $3,500 in cash was mainly $100 bills.

According to Buckholtz, Duhon called him in late July or early August regarding the electrical contractor at the warehouse construction site. Duhon claimed that the contractor had not seen him and become "right." Buckholtz told Duhon to see Lovett. The record indicates that there were four phone calls involving Buckholtz and the Lake Charles Electrical Workers Local, of which Duhon was president: on July 23, two on July 26, and one on August 19, 1974.

Buckholtz claimed that Lovett called him on August 19 and asked him to come to Lake Charles. Buckholtz refused at first, claiming he was too busy. Buckholtz then phoned Brandt and told him he had to deliver the money. After speaking with Brandt, Buckholtz called Lovett back and said he would go to Lake Charles that afternoon.

When Buckholtz arrived in Lake Charles he found Lovett and Duhon together. The three men then went for a ride in Duhon's car. During the ride, Lovett asked whether Buckholtz had brought it. Buckholtz removed the money from his pocket and remarked that he did not know how the payment was expected, and that he had placed the money in five envelopes, expecting that five different trades were going to be bought off. Lovett replied to the effect that no such division was contemplated, and that they would take care of the money. Buckholtz said Duhon had mentioned the problem of the electrical contractor and after the payment Duhon declared that everything was fine, and that the electrical contractor was "okay." Buckholtz considered the payment to have been made to both Lovett and Duhon.

Buckholtz stated that Duhon's car was having transmission trouble on August 19, 1974. The day after Buckholtz's trip to Lake Charles, Duhon's car was taken to a garage for repairs. The mechanic who repaired Duhon's car, Albert Young, testified that the vehicle had been running hot and only preventive maintenance was performed on the transmission. The Government sought to impeach Young's testimony by calling an FBI agent who stated that Young had previously told him that the problem had concerned the transmission's failure to shift correctly.

A. K. Newlin, the electrical contractor, testified that after the construction work had been proceeding for some time after the August 19 payoff, Buckholtz phoned him and said Duhon was complaining that Newlin had not succeeded in getting "right" with him.

1. Sufficiency of the Evidence

The jury obviously resolved the issue of credibility in favor of Mr. Buckholtz. On review we must determine whether the circumstances make belief of Buckholtz's version of the $5,000 payment unreasonable, and whether if Buckholtz's testimony is completely accepted a case of extortion has been proved beyond a reasonable doubt. Of course, the evidence must be reviewed in the light most favorable to the Government. *See Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Martinez*, 5 Cir., 1977, 555 F.2d 1248. We will first examine the alleged inconsistencies urged by the defendants as rebutting the credibility of Buckholtz's testimony.

Defendants' contention that the failure of Lovett and Duhon explicitly to request money at any point is inconsistent with Buckholtz's explanation of the payoff. This contention is without merit because the circumstances surrounding both the initial conversation between Lovett and Buckholtz and the later automobile ride including Duhon were such that ambiguous remarks can quite easily be understood as requests for money. In any case, this question was one for jury resolution, and we cannot conclude that its verdict was unwarranted under the circumstances. Defendants also point to Buckholtz's failure to inform anyone that he signed a labor agreement with Lovett and his failure to come forward with the charge of extortion for nineteen months. These facts are best explained in terms of Buckholtz's protection of his own interests. Defendants have also suggested that Lovett's acceptance of only a $5,000 offer is unrealistic, as a seasoned labor negotiator attempting to

extort would certainly bargain for more money. Defendants seek to buttress this view with the fact that Lovett did not set a time and place for payment at the time the $5,000 was offered by Buckholtz. This fact proves nothing conclusive, however, because both Buckholtz and Lovett must have known that if Buckholtz attempted to renege on his offer, Lovett could simply reimpose a picket line. Another fact urged by defendants as inconsistent with Buckholtz's testimony is the payment, predominantly in $100 bills, of $3,500 for the purchase of a camp soon after Buckholtz cashed the $5,000 check from West Brothers and received the sum in fifty $100 bills. The jury evidently believed either Buckholtz's explanation or that even if Buckholtz had used $3,500 of the $5,000 in late July, the $5,000 was nonetheless paid over to Lovett and Duhon on August 19.

The question now is whether the evidence offered by the Government is sufficient to prove extortion within the meaning of the Hobbs Act. The statute, 18 U.S.C. §1951, provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section —
>
> . . . . .

> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Buckholtz's testimony establishes that money had been obtained from him by Lovett and Duhon with his consent. However, the evidence regarding Buckholtz's state of mind during the period before the offer of $5,000 was made shows that he was motivated by fear of economic loss caused by the picketing. In addition, his previous experience with labor unrest in 1964 was shown to have resulted in some destruction of Buckholtz's property. The anticipation of economic loss constitutes "fear" within the meaning of the Hobbs Act. *See, e.g., United States v. Quinn*, 5 Cir. 1975, 514 F.2d 1250, 1267, *cert. denied*, 424 U.S. 955, 97 S.Ct. 2978, 47 L.Ed.2d 361 (1977); *United States v. Jacobs*, 5 Cir., 1971, 451 F.2d 530, 542, *cert. denied*, 405 U.S. 955, 92 S.Ct. 1170, 31 L.Ed.2d 231 (1972).

The crucial issue is whether defendants intended to induce the $5,000 payment by exploiting Buckholtz's fear of economic loss. If not, then defendants merely accepted a bribe, which does not constitute extortion or violate the Hobbs Act. The distinction between extortion and bribery was discussed in *United States v. Hyde*, 5 Cir., 1971, 448 F.2d 815, 833, *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972): "[t]he distinction from bribery is therefore the initiative and purpose on the part of the [defendant] and the fear and lack of voluntariness on the part of the victim." Thus, the defendant must intend to exploit the fear of the vic-

tim. The defendant need not have originally caused the fear, nor need the cause of the fear itself be wrongful. *See id.*

In the present case there is sufficient evidence to demonstrate both the existence of a reasonable fear on the part of the victims and the requisite intent to exploit that fear. Buckholtz and Brandt realized that the picketing would cause them serious economic harm if it continued. The fact that Buckholtz and Brandt had agreed between themselves before the July 26 meeting with the labor representatives to offer the union leaders $5,000 to remove the pickets does not preclude a finding that Lovett and Duhon intended to obtain money from Buckholtz and Brandt by exploiting their fear. The extortionist need not explicitly demand property before it is offered. The jury could reasonably find that Buckholtz and Brandt realized that they were being set up by unscrupulous labor leaders and were simply planning for an inevitable demand for money.[1] The uncompromising stance taken by Lovett at the July 16 meeting in DeRidder, including the veiled suggestion that picketing could expand to include West Brothers' retail outlets, is further evidence of defendants' intent to intimidate Buckholtz and Brandt. The jury reasonably concluded that the threat of continued and perhaps expanded picketing absent a payoff was implicit in the actions of Lovett and Duhon, and that the lack of an explicit threat or request for money was not inconsistent with

1 *See United States v. Hyde*, 5 Cir., 1971, 448 F.2d 815, 834, *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972): "[t]he jury could infer that these people knew of the general pattern of extortion and sought out Hyde with the knowledge that they would have to deal with him eventually . . . ."

a finding that Lovett and Duhon fully intended to exploit the vulnerability of Buckholtz and Brandt to the possibility of continued picketing.

This court has previously affirmed convictions for extortion where the defendant claims that the evidence only shows receipt of a bribe. *See, e. g., United States v. Quinn*, 5 Cir., 1975, 514 F.2d 1250, *cert. denied*, 424 U.S. 955, 96 S.Ct. 1430, 47 L.Ed.2d 361 (1977); *United States v. Hyde*, 5 Cir., 1971, 448 F.2d 815, *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745; *U. S. v. Jacobs*, 5 Cir., 1971, 451 F.2d 530, 405 U.S. 955, 92 S.Ct. 1170, 31 L.Ed.2d 231 (1972). In *Quinn* the court emphasized that "it is not necessary that the government prove that the fear was a consequence of a direct threat," 514 F.2d at 1266. The court in *Hyde* also noted that explicit threats were not required, and that the intent to extort could be inferred from the state of mind of the victim: " '[t]he jury is permitted to find such inducement by the use of fear from testimony as to the state of mind of the victim . . . .' (*quoting United States v. Tolub*, 2 Cir., 1962, 309 F.2d 286, 289). The victim's fearful state of mind is a crucial element in proving extortion." 448 F.2d at 845. The avoidance of explicit demands for personal payoffs and threats of adverse consequences if the payment is not made cannot in themselves save a defendant from a jury determination that he intended to extort. In proving the crime of extortion, where intent often must be inferred from ambiguous statements and situations, the jury's verdict must be accorded substantial weight.

Defendant Duhon contends that even if a case of extortion has been proved against Lovett, the evidence is

insufficient to identify him with Lovett's extortion scheme. Duhon was present at the July 16 meeting, where he voiced his dissatisfaction with Buckholtz's nonunion electrical contractor. Buckholtz testified that Duhon called him regarding the electrical contractor in late July or early August and complained that the subcontractor had not come by to see him and become "right." Buckholtz referred Duhon to Lovett. In addition, it was shown that three phone calls to Buckholtz had been made from Duhon's union local office, including one on August 19, the date of the payoff. Duhon remembered phoning Buckholtz on August 19, but could not recall talking to him. Duhon explained that the August 19 call was made at Lovett's request. Even more telling evidence of Duhon's guilt was his assurance to Buckholtz after payment of the $5,000 to Lovett that everything was fine with the nonunion electrical contractor. The only evidence that might possibly suggest that Duhon was not a party to Lovett's extortion is the testimony of the electrical contractor, A. K. Newlin, a government witness, indicating that months after the August 19 payment Duhon once again complained that the electrical contractor had not yet become "right" with him. But this testimony is inconclusive, as Duhon could have misled Buckholtz on August 19, or changed his mind since that time. Taken as a whole there was sufficient evidence to support the jury's conclusion that Duhon was involved with Lovett in the extortion of Buckholtz.

2. *Evidence of Previous Labor Conflict*

Evidence of Buckholtz's experiences with labor unrest on a construction site in 1964 involving some

destruction of equipment was admitted at trial. Defendants contend that the admission of this evidence was improper, inflammatory and prejudicial. The evidence was offered for the purpose of buttressing the prosecution's claim that Buckholtz was in reasonable fear of economic losses as a result of the picketing, and the trial court instructed the jury that the evidence was to be considered solely for its value in illustrating the fearful state of mind of Buckholtz. Defendants insist that admission of evidence of vandalism in an organizational struggle that did not involve extortion ran afoul of this court's decision in *United States v. Broadway*, 5 Cir., 1973, 477 F.2d 991.

In *Broadway* a panel of this court considered the admission of other wrongful conduct of a defendant. The evidence was admitted for the purpose of showing the defendant's intent in the case before the court. Because the other wrongful conduct did not "include the essential physical elements of the offense charged," *id.* at 995, it was not "similar" conduct, and therefore inadmissible. *Broadway's* holding was interpreted in *United States v. Bryant*, 5 Cir., 490 F.2d 1372, *cert. denied*, 419 U.S. 832, 95 S.Ct. 629, 42 L.Ed.2d 58 (1974), where the similarity requirement was explained as a matter of relevancy and of degree. The *Bryant* court quoted with approval from *United States v. Kasouris*, 5 Cir., 1973, 474 F.2d 689, 692 that " '[t]here is no necessity for synonymity but there must be substantial relevancy for purposes other than to show the probability that the person committed the offense being tried because he is a man of criminal character.' " *Id.* at 1377.

Considering this explanation for the similarity requirement, it is apparent that the defendants' claim is

without merit. The prior acts of vandalism against Buckholtz were not introduced to show the defendants' criminal character. The acts of vandalism were not committed by the defendants and were not admitted to demonstrate their intent. We cannot say that the evidence had the effect of impugning the character and intentions of the two defendants. The relevance of the evidence is clear, as this court has recognized the value of evidence of the state of mind of the victims of extortion. *See, e. g., United States v. Hyde*, 5 Cir., 1971, 448 F.2d 815, 845, *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972). Evidence of conduct of persons other than a defendant that is relevant to an alleged extortion victim's fearful state of mind is admissible regardless of its degree of similarity to the situation that gave rise to the alleged extortion.

3. *Refusal to Allow Testimony Regarding the Condition of Duhon's Automobile*

Buckholtz's testimony that Duhon's car had transmission trouble on August 19 was admitted to show that Buckholtz had been a passenger in Duhon's car. The Government called Albert Young, the mechanic who repaired Duhon's car on August 20, 1974, apparently to confirm Buckholtz's testimony regarding Duhon's transmission. Young testified that he had not noticed any problems with Duhon's transmission and that the replacement of the transmission filter and oil was merely preventive maintenance. The Government impeached Young's testimony by calling an FBI agent who stated that Young had told him that on August 20, 1974, Duhon's car would not shift correctly.

Defendants then offered the testimony of C. A. Nicholson, who purportedly examined Duhon's transmission nine months later when Duhon sought to sell the car. The claim is that Nicholson would have testified that a transmission problem was just emerging in May 1975. This testimony was offered to contradict the prosecution's evidence indicating transmission troubles in August 1974. The trial court sustained the Government's objection to Nicholson's testimony because it viewed the evidence as more misleading than helpful, noting that Duhon's car had been repaired twice since August 19, and that too much time had elapsed for the condition in May 1975 to be relevant to a determination of the condition in August 1974. The trial court has wide discretion in determining the relevancy of evidence, *see United States v. Linetsky*, 5 Cir., 1976, 533 F.2d 192, 204; *United States v. Allison*, 5 Cir., 1973, 474 F.2d 286, 288-89, *cert. denied*, 419 U.S. 851, 95 S.Ct. 91, 42 L.Ed.2d 82 (1974). We do not find an abuse of discretion in this case.

4. *Cross-Examination of a Defense Character Witness as to Other Charges Brought Against Defendant After the Events in the Present Case*

Defendant Duhon contends that the trial court erred in ruling in favor of the propriety of cross-examination of his character witnesses regarding Duhon's arrest and indictment on an independent charge subsequent to the events in the present case. Apparently as a result of this in chambers ruling, Duhon failed to call the character witnesses.

Duhon relies on *United States v. Lewis*, 1973, 157 U.S.App.D.C. 43, 482 F.2d 632, for the proposition that

cross-examination concerning subsequent arrests and indictments of character witnesses who were to testify as to the peaceful and law-abiding character of the accused is, as a general rule, impermissible. The *Lewis* court recognized that cross-examination on such subjects was basically within the trial court's discretion. *See id.*, 157 U.S.App.D.C. 53, 482 F.2d at 642.[2] This court has recently indicated its approval of the general rule espoused by Lewis.[3] Regardless of the proper rule for the admissibility of this evidence, the proof of Duhon's guilt was so convincing that any error must have been harmless. *See Chapman v. California*, 386 U.S. 18, 22-24, 87 S.Ct. 824, 827-28, 17 L.Ed.2d 705 (1942); *United States v. Lewis*, 1973, 157 U.S.App.D.C. 43, 482 F.2d 632, 646-47.

5. *Admissibility of Unsigned, Unadopted Statements of Prosecution Witnesses for the Purpose of Impeaching Their Testimony*

Defendant Lovett complains of prejudice caused by the trial court's refusal to allow cross-examination of Buckholtz on the basis of summaries of the statements of prosecution witnesses Buckholtz and Brandt to the FBI. Lovett insists that these unsigned and unadopted summaries compiled by the FBI revealed prior inconsistent statements of the witnesses. The asserted inconsistency involved the date (August 19 or 20) of Buckholtz's trip to Lake Charles to deliver the payoff money. Lovett later examined the FBI agent and cross-

2 The Supreme Court in *Michelson v. United States*, 335 U.S. 469, 480, 69 S.Ct. 213, 220, 69 S.Ct. 213, 93 L.Ed. 168 (1948), remarked on the discretion vested in the trial court in controlling the cross-examination of witnesses.

3 *See United States v. Candelaria-Gonzalez*, 5 Cir., 1977, 547 F.2d 291, 294 n. 5.

examined Buckholtz on the inconsistency in dates. Thus, the issue of the inconsistent dates was fully aired before the jury. It is inconceivable that any prejudice could have resulted from the trial court's insistence on not using these unadopted statements as a basis for cross-examination.

6. *Denial of Recross Examination of Buckholtz Regarding His Hearing Problem*

On redirect examination of Buckholtz, the prosecutor asked him if he sometimes had difficulty hearing questions, and Buckholtz answered affirmatively. No further information regarding Buckholtz's hearing problem was presented by the prosecution. On recross-examination Lovett sought to question Buckholtz about this issue, but was prevented by the trial court on the ground that it was not a matter touched on in the original cross-examination. Defendant should not be precluded from recross-examining a witness regarding a matter not broached until redirect examination. In this case, however, the error was harmless beyond a reasonable doubt.

7. *Jury Instruction Regarding the Legality of the Picketing at the Construction Site*

Lovett advances the argument that the trial court's instruction to the jury on the legality of informational picketing and the illegality of organizational picketing under certain circumstances was prejudicial error. The asserted bases for prejudice are: 1) that it improperly impugned the credibility of defendants by informing the jury that defendants'

knowledge of the legality of the picketing was a fact issue for the jury, and 2) the possibility that the picketing was illegal could impermissibly be taken by the jury as evidence of coercive intent on the part of defendants. Neither of these assertions is correct. Defendants' knowledge of the legal status of the picketing was relevant to explaining their conduct and state of mind as to the entire labor relations situation at the construction site. The court's instruction that the jury was to decide whether union representatives knew the legal status of the picketing was no more than an admonition that the judge was not usurping the jury's role of determining the defendants' state of mind, and should not be taken as indirectly impeaching the defendants. The court's instruction was therefore not erroneous.

8. Jury Argument

Lovett claims that the prosecutor in effect stated that a verdict of not guilty would undermine law enforcement efforts in the future because it would discourage victims of extortion from coming forward as witnesses, and that this constituted prejudice. Examination of the prosecutor's remarks reveals that the defendant's claim is unwarranted.[4] The prosecutor's

4 The prosecutor's concluding remarks were:

> You know, we wonder, we wonder why no one will come forward as a witness. There is the reason. You think he won't pay a price. Wait until his next construction in DeRidder. You think he hasn't paid a price? He is a witness, a man who got money taken from him and he is called a thief. Oh, no, Ladies and Gentlemen, you can't have it both ways. Either Gene Buckholtz is an honest man who came forward and told the truth and fulfilled his duty as a citizen and was a witness and these men are guilty as charged, or he is the thief and the crook and the con man they paint him to be. And I submit to you that would be the height, that would be the ruination of an innocent life.

remarks were relatively mild and not prejudicial.[5] He merely noted the cost to Buckholtz's reputation in order to emphasize the credibility of the crucial government witness.

9. Variance of Evidence from the Indictment

The indictment charged defendants with taking money from Buckholtz by extortion. Lovett argues that the evidence at most demonstrated that the $5,000 was extorted from West Brothers rather than Buckholtz. This contention is without merit, as Buckholtz was the person who was negotiating with Lovett when the extortion demand was made, and the person who delivered the $5,000 to Lovett and Duhon. There has been no suggestion that Lovett and Duhon knew that West Brothers had given Buckholtz a check to cover the $5,000 payment. Therefore, the evidence proved an extortion of Buckholtz, as charged in the indictment.

AFFIRMED.

5 *See United States v. Millet*, 5 Cir., 1977, 559 F.2d 253, 258 (finding prosecutor's closing remarks to have had only an "insubstantial and insignificant impact").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3998

D. C. Docket No. CR-76-709

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARLAN DUHON and
DONALD RAY LOVETT,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 3, 1978

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3998

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARLAN DUHON and DONALD RAY LOVETT,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING

(January 30, 1978)

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT A. AINSWORTH, JR.
United States Circuit Judge

[Filed: JAN. 30, 1978]

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3998

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARLAN DUHON and
DONALD RAY LOVETT,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

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ORDER:

The motion of APPELLANTS for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including March 1, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ROBERT A. AINSWORTH, JR.
UNITED STATES CIRCUIT JUDGE

[Filed: FEB. 6, 1978]